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1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF MASSACHUSETTS

3 VOL. I
4 PGS. 1-220
5 EXHIBITS 1-6

6 ARY JEWELERS, LLC,

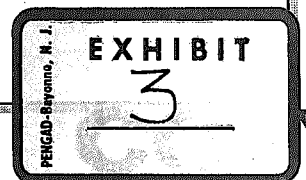
7 Plaintiff,

8 vs

9 IBJTC BUSINESS CREDIT CORP., and
10 DAVID MOLINARIO,

11 Defendants.

12 DEPOSITION OF THOMAS F. MORGAN, a witness in
13 the above-entitled cause, taken before
14 Lori J. Atkinson, Professional Court
15 Reporter and Notary Public in and for the
16 Commonwealth of Massachusetts at the Westin
17 Hotel, Copley Place, 10 Huntington Avenue,
18 Boston, MA, on the 15th of June, 2005,
19 commencing at 10:00 a.m. pursuant to the Federal
20 Rules of Civil Procedure.
21
22
23
24
25



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1 Morgan. The fine lawyer your left is Mr.
2 Gayer. Have you ever met or talked to Mr.
3 Gayer before?

4 A. I don't have any recollection of speaking to him,
5 no.

6 Q. All right. Mr. Gayer is also working with
7 an outstanding lawyer in his same firm by the
8 name of Robert Fischler. To your knowledge,
9 have you talked to Mr. Fischler, or to your
10 knowledge, anyone with Mr. Gayer's or
11 Mr. Fischler's law firm?

12 A. I don't recall having spoken to anyone. Although
13 I can't be a hundred percent sure.

14 Q. Let me just -- to your recollection and I'm
15 talking -- let me ask you this way: You are here
16 subpoenaed in a lawsuit that is styled ARY
17 Jewelers LLC versus IBJTC Business Credit
18 Corporation and David Molinaro, correct?

19 A. Correct.

20 Q. And you are not party to that lawsuit. I'm sure
21 you never will be a party to that lawsuit;
22 you understand that?

23 A. Yes.

24 Q. Have you ever talked to anyone that you can think
25 of, I guess, I would focus especially more

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1 recently, Mr. Morgan, about anything related to
2 this particular lawsuit, ARY Jewelers LLC
3 versus IBJTC Business Credit Corporation and
4 David Molinario?

5 A. I can say for certain that I have had no
6 conversations regarding this case with anyone for
7 at least the last 24 months.

8 Q. Fair enough, sir. Were you, if you can
9 recollect, were you even aware that such a
10 lawsuit had been filed and existed prior to
11 either -- I guess prior to shortly before you
12 being served with a subpoena to commanding your
13 appearance to give your deposition or your
14 testimony?

15 A. I was aware that there was a lawsuit or one that
16 was potentially being filed. I did not know the
17 status where it stood, until being served the
18 subpoena.

19 Q. All right, sir. I'm just curious. You will
20 find, Mr. Morgan, some of my questions,
21 especially I don't know your industry that
22 well are just dumb questions, so I will
23 apologize. Some of them are just curiosity
24 questions. This is a curiosity question:
25 Do you recollect how you found out that such a

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1 accepted banking practice, maybe not an accepted
2 banking practice at all, based on your years
3 in the banking industry?

4 MR. GAYER: Note my objection.

5 Q. Or you did you not do enough traditional --

6 A. It depends on what you mean by sharing
7 information. Information can be shared for a
8 variety of reasons. One bank, you know, may
9 send a potential borrower to another even
10 though they can't do the loan. So when
11 you say "sharing information," I need to
12 understand more what you mean by sharing
13 information.

14 Q. In that one sending to another, that would
15 probably be in a permissive context, would
16 it not, if you want to share information from one
17 bank to another because you are referring
18 a customer, potential customer, and you shared
19 information you probably had information to do
20 so?

21 MR. GAYER: Objection to form.

22 A. Permission from?

23 Q. From the customer, potential customer?

24 A. I wouldn't say that that is, for example, one
25 institution for whatever couldn't do a deal would

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1 they necessarily ask the customer's permission to
2 forward the information to someone that might do
3 the deal? I don't think that is always the case
4 that they would. I think an assumption is
5 made that it would be done as a means of
6 trying to help the customer, would they obtain
7 permission specifically in writing; possibly,
8 possibly not. Depends on what the procedures
9 are.

10 Q. Okay. Can you think of a situation that
11 you're familiar with where two institutions were
12 competing for some loan business where they were
13 sharing what might be considered private
14 confidential information about the customer and
15 prospective customer without permission to do so?

16 MR. GAYER: Note my objection to the
17 form.

18 A. If I was competing for business with a potential
19 lender, I don't believe I would share information
20 with that potential lender.

21 Q. Let me switch back to the asset-based lending.
22 What year, approximately, were you up to
23 now, Mr. Morgan, that you switched from again the
24 more traditional side of banking, as you have
25 just described it very well, the asset-based

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1 lending side of banking?

2 A. That would be 1992.

3 Q. Do you remember your official position or title
4 when you made that switch to asset-based lending
5 in 1992?

6 A. Yes. It was asset-based auditor.

7 Q. I probably have some idea, but if you wouldn't
8 mind telling us kind of generally what you
9 did as an asset-based lending auditor?

10 A. Primary responsibilities of the auditor was to
11 perform periodic audits on not only existing
12 clients, but also potential new clients that
13 involved carrying out certain due diligence
14 procedures that the bank required. Auditors go
15 out on the site, to the clients and perform those
16 procedures and compile them in the form of
17 a report that the account officers would review.

18 Q. And how long did you remain in that position, I
19 think we are still with Shawmut Bank?

20 A. That's correct.

21 Q. As an asset-based lending auditor?

22 A. Approximately three years.

23 Q. And the asset-based lending that Shawmut Bank
24 was doing at that time and that you were doing
25 the auditing of those clients or those accounts,

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1 from us. You know, in effect it is a
2 new transaction. The same company but a different
3 relationship, different owners.

4 There would be an fair amount of
5 due diligence going into it, making a credit
6 determination and whether it's one to
7 continue the new buyers.

8 Q. Is that something that Foothill was in the
9 business of doing?

10 A. Yes.

11 Q. Evaluating lending opportunities or loan
12 potentials, correct?

13 A. Correct.

14 Q. How did Foothill go about doing its due
15 diligence on an potential lendee -- an potential
16 customers? Did y'all do it internally or
17 externally or combination; how did that work?

18 A. Combination.

19 MR. GAYER: Note my objection to the
20 form.

21 BY MR. CARRIGAN (CONT'D):

22 Q. Did you consider that Foothill utilizing this
23 combination that the due diligence and
24 in-house and out-house was fully competent
25 to performed equate, even more than adequate, due

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1 diligence on a prospective customer?

2 A. Yes.

3 Q. In your observations and your experience with
4 Foothill, did they do a good job at it?

5 A. I believe so, yes.

6 Q. Did Foothill need, in your mind, the help from
7 its competitors -- from its competition in order to
8 do, perform adequate due diligence on a
9 prospective customer or client?

10 MR. GAYER: Note my objection to the
11 form.

12 A. Foothill has its own policies and procedures.
13 They wouldn't rely on its competitors to do it
14 for them.

15 Q. Was it ever a part of Foothill's due diligence to
16 contact without permission competitors to find
17 out what they knew or what they thought of
18 a potential customer or client?

19 MR. GAYER: Note my objection to the
20 form.

21 A. Could you repeat the question.

22 Q. Was it ever part, to your knowledge, of
23 Foothill's due diligence to without authority
24 contact a competitor to see what, if anything,
25 they knew about this prospective customer;

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1 what information they had on them, whether
2 or not they would consider loaning money to
3 this prospective customer? Anything like that?

4 MR. GAYER: Object to the form.

5 A. I can't speak to any specific instance.
6 It is reasonable to think that it occurred, yes.

7 Q. Without the customer's permission?

8 A. I can't say that it's never happened.

9 Q. Well, let me rephrase the question and ask you:

10 In your mind, would that would have been
11 standard practice within the industry to
12 as part of some -- someone's due diligence to
13 contact without permission from the client, or
14 prospective client, and competitor to find
15 out what they knew about that prospective client?

16 MR. GAYER: Note my objection to the
17 form.

18 A. I don't know if it was standard practice. I do
19 not think it would be unusual.

20 Q. In your years you can't think of any instance
21 where you did that at Foothill?

22 MR. GAYER: Objection.

23 Q. Or anyone did at it Foothill?

24 A. I can't speak for anybody else. I can speak for
25 myself.

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1 Q. You are not aware of anyone that did it, correct?

2 A. I don't have any recollection.

3 Q. Now, would you -- if you in fact in your sworn
4 testimony back when you gave your deposition
5 back on May 21st and 22, over that two day
6 period 2001, testified that that was not your
7 practice to do that and you would never
8 do that. In fact it was clearly and specifically
9 against Foothill's policy to do something
10 like that. You wouldn't back down or take
11 away from that sworn testimony that you
12 gave back May 21st and 22nd of 2001, would
13 you?

14 MR. GAYER: Note my objection. Steve,
15 obviously, I can't correct the witness not to
16 answer. In fairness though, if you are
17 referring to specific testimony, I think it
18 might be helpful to refer the witness to the
19 testimony rather than characterizing the
20 testimony. That's a suggestion. I object
21 for the record. But you can proceed as you deem
22 fit.

23 BY MR. CARRIGAN (CONT'D):

24 Q. If you testified to that May 21 and 22, you
25 wouldn't back down to that now?

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1 was my account."

2 Question: "How did he know about
3 ARY's request for a proposal from Whitehall?
4 Was he working on the account?"

5 Answer: "I don't know if he was
6 specifically working on the account, but he
7 obviously knew that ARY was shopping the
8 deal with IBJ."

9 Does that sworn testimony given under
10 oath back in May of 2001 refresh your
11 recollection today?

12 A. Yes.

13 MR. GAYER: Note my objection to the
14 form.

15 BY MR. CARRIGAN (CONT'D):

16 Q. Now, would it have been the practice of both you
17 and Foothill not to disclose information about
18 one of your clients or one of your borrowers, any
19 information about one of your borrowers, one of
20 your clients that your client does not give you
21 permission to disclose?

22 MR. GAYER: Note my objection to form.

23 A. If it is information that is proprietary and
24 confidential, it's not Foothill's policy
25 to disclose it without customer's permission.

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1 but I believe they were internet printed pages;
2 stuff that was pulled off that you bring up on
3 the internet and print it out.

4 Q. Do you recall that it was information from the
5 Dow Jones news service wire; does that refresh
6 your recollection?

7 A. No, I don't recall.

8 Q. It was the kind of information that someone
9 with a computer could obtain off the internet?

10 A. It appears to be information that was obtainable
11 to whoever.

12 Q. It wasn't confidential, customer information;
13 isn't that right?

14 A. I don't believe it was information that was
15 provided by the customer, no.

16 Q. I think you testified earlier about what
17 Foothill's policy was as far as handling
18 confidential information; do you recall that?

19 A. Yes.

20 Q. Is it fair to say your policy was not to
21 disclose proprietary and confidential
22 information; isn't that right?

23 MR. CARRIGAN: Objection. You are
24 misleading him intentionally, Lee. The answer
25 in his deposition testimony, which is the good

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1 answer is information, period.

2 MR. GAYER: Let me ask my questions.

3 MR. CARRIGAN: Why are you trying to
4 trick or mislead this witness. You certainly
5 are and you know you are. I can't believe you
6 are doing that.

7 BY MR. GAYER (CONT'D):

8 Q. Mr. Morgan, what was the policy while you were
9 you at Foothill?

10 A. Not disclose proprietary information unless
11 instructed by some legal entity or kept
12 proprietary.

13 Q. Proprietary information, right?

14 A. Yes.

15 MR. CARRIGAN: Objection. That's not
16 what he testified.

17 Q. Mr. Carrigan I think referred you to a page of
18 your deposition transcript, bear with me
19 while I look at that.

20 Mr. Carrigan referred you to testimony
21 that you had given at your prior deposition.
22 And I think he referred to you to page 146 at
23 the bottom of that page. It was a question that
24 began at line 15 and then carries over to page
25 147. Can you take a look at that for me,

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1 please?

2 MR. CARRIGAN: What page?

3 MR. GAYER: Page 146 to 147 of the
4 prior deposition.

5 BY MR. GAYER (CONT'D):

6 Q. Let me know when you have had a chance to look
7 that over?

8 A. Yes.

9 Q. Sir, is there anything in that answer --
10 that question and answer that goes over from page
11 146 to 147 that you view as inconsistent
12 with your testimony today meaning that the
13 policy was not to disclose or disseminated
14 proprietary information?

15 A. Well, let me say by defining what my definition
16 of the proprietary information is, information
17 provided to me directly by my borrower as opposed
18 to information that may be obtained through some
19 public source. When I say "proprietary"
20 the borrower gives me a business plan that is
21 confidential information and then for my eyes
22 only. I'm not going to share that with anybody.

23 It is information that, you know, is
24 publically available. You might call that
25 proprietary, no.

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1 agreed upon by that point due diligence probably
2 would have already started. But the due
3 diligence process would need to be completed.
4 That would include appraisal, if necessary. Field
5 examinations. Examinations of books and records
6 of potential borrower. Once those results were
7 in and reviewed, if everything looked okay,
8 it would go to the commitment letter stage.

9 Q. Would it be the normal procedure during
10 the course of due diligence from Foothill to do
11 some type of background check on the potential
12 lender?

13 A. Yes.

14 Q. I think you may have mentioned this
15 earlier -- withdrawn.

16 Would that be done internally by
17 Foothill or would you normally contact an
18 outside vendor to do that?

19 A. We would have contacted -- we have a couple of
20 outside vendors that we would use to do
21 background checks that used to be handled by our
22 underwriting department.

23 Q. Is it correct that a background check would
24 normally include a search of media reports
25 and things of that nature regarding the

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1 borrower?

2 A. It could.

3 Q. And an internet search including that, right?

4 A. Yes.

5 Q. If you take an look at what has been marked as
6 Exhibit 3. I would like to kind of fast forward
7 to the end. Actually it is page three, paragraph
8 ten. And the heading of that paragraph is
9 conditions precedent; do you see that?

10 A. Yes.

11 Q. Is it fair to say conditions precedent refers to
12 things that have to happen or things that need to
13 be accomplished before a commitment letter
14 would ever be issued?

15 A. Yes.

16 Q. Just take a look at, if you would, at
17 subparagraph C, which refers to loan origination
18 cost including but the not limited to audit fees,
19 attorney's fees, search fees, appraisal
20 documentation and filings shall be paid by
21 borrower; do you see that?

22 A. Yes.

23 Q. Do these fees or other items mentioned here, are
24 those what you are talking about as part of the
25 due diligence process?

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1 about halfway down a little bit more than
2 halfway down in the paragraph it says, it
3 refers to an order to obtain the lender's legal
4 approval to effect completion of the financing
5 arrangement herein contemplated; do you see that
6 language. Right before the second sentence.

7 It says "In order to obtain lender's
8 legal approval to effect the completion of
9 the financing arrangements herein contemplated"?

10 Let me if you don't mind, I will
11 come around.

12 A. Sure.

13 Q. Okay. My question to you is: Would that suggest
14 to you that these are things that need to
15 be done or accomplished prior to the issuance of
16 the commitment i.e., approval as opposed to loan
17 closing?

18 A. Well, again, a commitment letter dose not
19 constitute as a closed loan from the commitment
20 stage to the closing the stage there are some
21 things that have to happen. Because we offer a
22 commitment doesn't guarantee we are going to
23 close.

24 Q. Let me refer you to phrase litigation
25 searches. Do you see that in subparagraph B?

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1 A. Yes.

2 Q. Does that mean that before a commitment or
3 closing on the loan the borrower would need
4 to disclose litigation that it's involved in?

5 A. Yes.

6 Q. This is a standard provision in these type of
7 proposal letters?

8 A. Yes.

9 Q. And would it be correct that it would require
10 litigation information concerning parent
11 companies and affiliate?

12 A. Yes.

13 Q. That's standard operating procedure, is it
14 not?

15 A. Yes.

16 Q. Is it your understanding that ARY Jewelers
17 LLC was a subsidiary of the ARY Group or
18 ARY Trading, which is a foreign company?

19 A. My understanding was that ARY Trading was the
20 parent company and that ARY LLC was setup
21 for purposes of doing business in the states.
22 That was the best of my recollection and
23 my understanding.

24 Q. ARY Trading or the ARY Group was some type of
25 parent entity?

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1 A. Related entity or parent.

2 Q. Would it be fair to say that ARY would have to
3 disclose litigation involving ARY Trading
4 pursuant to this subparagraph E of this document?

5 A. Yes.

6 MR. CARRIGAN: Objection. That calls
7 for a legal conclusion. There is no predicate
8 laid for expertise in answering that.

9 BY MR. GAYER (CONT'D):

10 Q. In any event, you have already testified that
11 Foothill had done its background check to search
12 for that kind of information; is that right?

13 MR. CARRIGAN: Objection. Leading.

14 A. Yes.

15 Q. When you spoke to Mr. Molinario on or about
16 February 28, 2001, is it correct that he told you
17 that IBJ had determined not to issue a loan to
18 ARY?

19 A. I don't recall. I would have to go through my
20 testimony back in May.

21 MR. GAYER: Let's go off the record
22 for a second.

23 (Discussion off the record.)

24 BY MR. GAYER (CONT'D):

25 Q. At the time that you received the call from

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1 point in time is the information that was
2 provided to you by, Mr. Molinario; correct, sir?

3 MR. GAYER: Note my objection.

4 Objection to the form.

5 A. Again, my interpretation and how I believe
6 I meant this when I stated it is information that
7 that borrower provides me.

8 Q. Again, my question to you is: He asks you
9 about do you have any duties to protect
10 the information of your borrowers; correct?

11 A. Yes.

12 Q. He didn't define specifically what information?

13 MR. GAYER: Objection to the form. It
14 says what it says.

15 A. No.

16 Q. He certainly didn't qualify it by saying
17 proprietary or confidential information, did he,
18 sir?

19 MR. GAYER: Objection to the form.

20 A. No.

21 Q. The information when y'all had used that word
22 previously in this deposition and immediately
23 before this question, the information or the type
24 of information you have been talking about is
25 what was transmitted to you by Mr. Molinario,

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1 y'all have been discussing was the information
2 that you received about ARY and you state
3 here, do you not, sir, "But it is my practice
4 and the practice of my firm not to disclose
5 information about my borrower that my borrower
6 does not give me permission to disclose."
7 Is that your answer?

8 MR. GAYER: Objection to the form.

9 A. I don't understand the correlation between
10 the question on line one and the question
11 on line 15. How do the two relate. One is
12 talking about information that was sent to
13 me. The question on 15 is related a totally
14 different question where he is asking me
15 is it my practice to protect the information of
16 my borrower? I don't know what correlation that
17 has with the information that I received
18 from Mr. Molinario.

19 Q. Because he is asking you to put yourself in the
20 situation of Mr. Molinario and the information
21 that he received about one of his borrowers or
22 potential borrowers. He is asking you, sir,
23 what do you think your duties are to your
24 borrowers and you say, "It is my practice
25 and the practice of my firm not to

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1 disclose information about my borrower that my
2 borrower does not give me permission to
3 disclose." Correct, sir?

4 MR. GAYER: Objection to form.

5 A. This is information my borrower provides
6 to me; financial statements, business plans,
7 confidential information related to their
8 business. When I answered this question that was
9 my mind set.

10 Q. Let me go back to the allegation against you for
11 you being a liar and cheat and criminal?

12 MR. GAYER: Objection.

13 Q. Again, sir. I will ask you, is it okay --

14 MR. GAYER: You know, Steve.

15 Q. -- if another banker doesn't get that from you,
16 the client, but he gets it from an internet
17 source, that's okay to pass on to another banker
18 without your permission?

19 MR. GAYER: Objection to form.

20 A. If it is done with malicious intent, no.
21 Do I like what Mr. Molinario said to me in
22 his deposition? No. Because it is untrue and it
23 is unfounded. But you know what, it is a -- keep
24 it in perspective of how it relates to May 21 and
25 22 of 2001, which was four years ago.